FILED
FEB 26 1957
JOHN T. FEY, Clerk

No. 802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

E. L. FARMER & COMPANY, a Corporation, *Petitioner*

v.

MARSHALL W. HOOKS and AMERICAN MOTORISTS INSURANCE COMPANY, a Corporation, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDIX

WARREN E. MAGEE
745 Shoreham Building
Washington 5, D. C.

CLYDE J. WATTS
760 First National Building
Oklahoma City, Oklahoma

HOWARD BARKER
1500 Sinclair Building
Ft. Worth 2, Texas

Attorneys for Petitioner

February, 1957

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Petition for Writ of Certiorari	1
The Opinion Below	2
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	3
Reasons for Granting the Writ	8
I. The decision of the Court of Appeals is not in accord with and is "opposite" and contrary to the controlling law of Texas	9
II. The decision below and an earlier decision of the court below are "opposite" and in direct conflict with two decisions of the Fifth Circuit in construing the law of Texas	18
Conclusion and Prayer	23

Table of Cases Cited

Bagby v. Barton, 131 F. 2d 887	19
Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 152 S. W. 2d 1073, 1074	14
Dewinne v. Allen (1955) 277 S. W. 2d 95	13
Erie R. Co. v. Tompkins, 304 U. S. 64	8, 18
Gonzales v. Broussard (Tex. Civ. App.) 274 S. W. 2d 737	10
Guaranty Trust Co. v. York, 326 U. S. 9	18
Hall v. Medical Bldg. of Houston (1952) 251 S. W. 2d 497	12, 13
Houston Nat. Bank v. Adair (S. C., Tex., 1948) 207 S. W. 2d 374	12
International Great Northern R. Co. v. Lowry (1938) 121 S. W. 2d 585	16
Jameyson v. Farmers Gin Co.-Operative Association, 278 S. W. 2d 169	15

Page

Kallum v. Wheeler, 129 Tex. 74, 101 S. W. 2d 225 14
Mackey v. F. W. Woolworth Co. (1953) 277 S. W. 2d 180 13
Magnolia Petroleum Co. v. Cocke (1928) 3 S. W. 2d 139 .....15, 16
Marshall v. San Jacinto Building, 67 S. W. 2d 372 .. 13
McElhenny v. Thielepape (S.C., Tex., 1956) 285 S. W. 2d 940 .....12, 13
McFerren v. Brae Burn Country Club (1955) 274 S. W. 2d 122 14
McKee v. Patterson, 153 Tex. 517; 271 S. W. 2d 391 ..10, 11, 13, 18, 19, 21
Oaxaca v. Lowman (Tex. 1956) 297 S. W. 2d 729 ....10, 15
Otto v. Bobo (1956) 287 S. W. 2d 274 13
Phoenix Refining Co. v. Tips (1935) 81 S. W. 2d 60 ..15, 16
Russell v. Todd, 309 U. S. 280 18
Skillerns v. Paxton, 293 S. W. 2d 521 13
Swift & Co. v. Schuster, 192 F. 2d 615 .....8, 22
Union Gas Co. v. Madeley (1923) 55 S. W. 2d 259 15
U. S. Gypsum Company v. Balfranz, 193 F. 2d 1 ....8, 19
Wichita Royalty Co. v. City National Bank, 306 U. S. 103 18

STATUTES INVOLVED

28 U. S. C., Section 1254 (1) 2
28 U. S. C., Section 1652 .....2, 9, 18, 22

MISCELLANEOUS

Volume 33, Texas Law Review, No. 1, pp. 1-23 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

E. L. FARMER & COMPANY, a Corporation, *Petitioner*

v.

MARSHALL W. HOOKS and AMERICAN MOTORISTS INSURANCE COMPANY, a Corporation, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, E. L. Farmer & Company, prays that a Writ of Certiorari issue to review the erroneous decision and judgment of the United States Court of Appeals for the Tenth Circuit entered below on November 26, 1956.

THE OPINION BELOW

The District Court filed no opinion below. The opinion of the United States Court of Appeals for the Tenth Circuit is printed in the Appendix hereto, infra, pages 1a-10a, and is reported in 239 F. 2d 547.

JURISDICTION

The decision and judgment of the Court of Appeals were entered on November 26, 1956 (App. pp. 1a, 11a).[1] A timely Petition for Rehearing (R. 246)[2] was denied by the court below on December 31, 1956 (App. 11a). The mandate of the court below has been stayed until February 26, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

1. Whether the District Court and the Court of Appeals properly and correctly applied the substantive and controlling law of the State of Texas, where the accident in this case occurred

STATUTE INVOLVED

The statute involved in this case, which the decisions below contravene, is the Rules of Decision Act, 28 U.S.C., Section 1652, reading as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress require or provide, shall be regarded as rules, of decision in civil actions in the Courts of the United States, in cases where they apply."

---

[1] App. refers to the Appendix printed at the end of this petition.

[2] R. refers to the printed transcript or record filed herewith.

STATEMENT

Respondent, Marshall W. Hooks, brought an action for personal injuries which he alleged he sustained when a platform fell on him. Prior to instituting this civil action, respondent Hooks had sought compensation and medical expenses and had obtained them under the Workmen's Compensation Laws for the State of Texas and obtained maximum compensation payments and all of his medical expenses. Accordingly, the insurance carrier of respondent Hook's employer, respondent American Motorists Insurance Company, was a party in the action to recover the full compensation payments and all medical expenses this insurance company was obligated to pay in exchange for the premiums Kerr-McGee paid to cover its employees. (R. 6-7).

Petitioner denied negligence in the temporary placement of the platform and alleged petitioner breached no duty owing respondent Hooks, who was at most a licensee, and that respondent Hooks in crawling under the platform to eat his lunch proximately caused the accident of which he complained and, in so doing, thus made a voluntary choice and assumed the risk of possible injury while squatting under the platform (R. 7-11).

The case was tried twice to a jury in the United States District Court for the Western District of Oklahoma (R. 11, 21, 37) and the evidence established the following facts in the second trial:

Petitioner contracted with Kerr-McGee to hoist oil field equipment from mud tanks near the well site, in Texas, and move it out of the way until needed in the assembly of the rig, when petitioner would haul

it back (R. 48, 108, 114). Kerr-McGee had cleared an area surrounding the well location approximately 150 feet square with a bulldozer (R. 40, 47). Petitioner's employees stored the heavy equipment in the rough areas at the edge of the clearing (R. 41-43). Between 8:30 and 9:30 A.M. on the day of the accident, petitioner's employees, with a gin pole truck, moved the platform, or monkey board as it was called, from the mud tank to a location 200 feet away at the edge of the bulldozed area (R. 47, 76, 76, 107, 114, 119) and the monkey board was placed against a mesquite tree approximately 12 to 15 feet in height, with the long side of the 8 x 10 foot platform resting on the ground at a 45 degree angle. The board rested against the tree approximately 2 feet off center. It weighed from 800 to 1600 pounds. (R. 55, 56, 69, 109, 115, 117, 127). As placed it could be openly seen and was obvious to all persons on the well location (R. 75, 76, 109, 116).

The board was leaned against the tree for the convenience of petitioner's employees in the performance of their work. They planned to return when the monkey board was needed and attach a winch line to the board in order to assemble the board into the rig (R. 118, 121). The board was only temporarily placed against the tree and it looked safe to the truck driver who placed it there (R. 120). When the board was in position against the tree, petitioner's swamper, who was assisting the driver in moving the board (a man weighing from 180 to 190 pounds) jumped upon the board and unfastened it (R. 116). It stayed firm against the tree. (R. 120)

Respondent Hooks, who was 45 years of age at the time of the accident, had worked as a roughneck in oil fields for four years. Kerr-McGee hired him the

day before the accident. Hooks saw the well location that day. (R. 52, 53, 60) He reported for work the following day at 9:30 A.M. and worked through the morning at the well substructure, during which time the monkey board rested firmly against the mesquite tree. (R. 54) When Kerr-McGee's superintendent called a break for lunch about noon, respondent Hooks, unlike the rest of the men working on the substructure, who ate their lunches under the substructure at the well site where it was shady (R. 67, 113, 132), decided he would eat his lunch in the shade of the mesquite tree and under the monkey board (R. 55, 64, 66). He had observed the board against the tree as he went to his automobile to get his lunch kit (R. 55, 64), had noticed that the tree and board furnished some shade and that the board was leaning against the tree at a 45 degree angle (R. 55-56). Respondent Hooks testified he did not know "for sure" whether he sat under the monkey board but obviously he must have because the board slid down the tree and struck his back (R. 57). Instead of eating his lunch in his automobile or at the substructure, he crawled under the board to eat and testified that he could touch both the tree and the board from where he was sitting (R. 56-57). Almost immediately after Hooks sat down under the board to eat his lunch, the board skidded down the tree, fell upon his back and injured him (R. 57, 58, 65, 70). Thus, Hooks testified, before the board struck him he heard a pop, and *as he leaned forward to raise up* the board struck him on his back (R. 57, 58). He testified further, "it didn't enter his mind whether it (the board) was safe or not because I didn't intend to do anything to it. I wasn't going to bother it myself, *to start with.*" He testified the board looked substantial (R. 60). We pause to point out that this board

rested against the mesquite tree from 8:30 A.M. until noon, that another man of about 190 pounds in weight jumped on it to unhook the line, yet it did not move. Yet, respondent Hooks, who crawled under it and who could touch both the board and the tree, said he did not touch either! This taxes credulity. There is only one logical answer to the cause of this accident. Hooks either touched and moved the board or the tree. There is no other cause for this accident, and we say no reasonable man can read this record objectively and come to any other honest conclusion.

The undisputed evidence was all to the same effect and showed that none of Kerr-McGee's employees had any reason to place themselves near or under the monkey board leaning on the tree in the normal performance of their work (R. 72, 113, 125, 132).

The trial court refused petitioner's requested instructions that respondent Hooks, as he was not an employee of petitioner, was at most when he crawled under the monkey board for his own personal reason, that is, to eat his lunch in the shade there, a licensee to whom petitioner owed only the duty not to wilfully and wantonly injure him. The trial court refused to define "assumption of risk" as that term was defined by the law of Texas, where the accident occurred, as charging respondent Hooks not only with a known or obvious dangers, but also with those which he might have known of in the exercise of ordinary care (R. 12-20). Instead, the trial court instructed the jury to measure petitioner's conduct by the standard of the ordinary prudent person in the placement of the board! That court erroneously instructed the jury that if the defendant under such a standard of care could have anticipated that in the mere placing of the board

against the tree workmen working around the well site *might* get hurt, such placement constituted negligence and required a verdict for respondent Hooks. (R. 139) The trial court erroneously charged the jury, contrary to the controlling law of Texas on the assumption of risk, as follows (R. 140):

> "Thus, in the instant case *if the plaintiff knew that a dangerous condition existed* due to the manner in which the monkey board was resting against the instant tree; *and, with full knowledge of such apparent danger voluntarily placed himself in a position of peril* and as a consequence was injured, plaintiff cannot recover from the defendant. However, *if plaintiff was not apprised of the dangerous condition or the presence of hazard,* then the plaintiff, by sitting near the tree in question *cannot be deemed to have assumed the risk.*" (Emphasis added)

Petitioner objected to this charge because it limited the assumption of risk to situations where a defendant *knew* that a dangerous condition existed, whereas under the law of Texas the jury should have been instructed that term included dangerous conditions which a defendant *"should have known"* as well as those of which he had full knowledge (R. 143, 144). The trial court refused to thus correct its charge (R. 144).

The jury returned a "quotient" verdict for respondent Hooks in the amount of $105,039.43 against petitioner, and in favor of respondent, American Motorists Insurance Company, Kerr-Magee's compensation insurance carrier, in the amount of $16,552.27, representing compensation and medical expenses paid by said company to and for respondent Hooks, against

petitioner. (R. 29) The District Court entered a judgment on the verdict (R. 20-21).

Petitioner's motions for a directed verdict, for judgment n.o.v. and for a new trial were denied (R. 22, 33, 104).

Petitioner appealed to the United States Court of Appeals for the Tenth Circuit. It affirmed on November 26, 1956 (App. 11a) and denied petitioner's request for a rehearing on December 31, 1956 (App. 11a). The mandate of the court below has been stayed until February 26, 1957.

REASONS FOR GRANTING THE WRIT

Several of the grounds usually considered by this Court as a basis for certiorari are present in this case. Both the District Court and the Court of Appeals have flatly refused to follow the substantive and controlling law of the State of Texas as required by *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 and the many decisions of this Honorable Court following it. In addition, there is a direct conflict in the construction of the law of Texas insofar as that law applies to the facts in this case between the Tenth Circuit in its decision in *Swift & Co.* v. *Schuster,* 192 F. 2d 615, the decision below which is similar to the *Swift & Co.* decision, and the decisions of the Fifth Circuit construing Texas law in *Bagby* v. *Barton,* 131 F. 2d 887 and *U. S. Gypsum Company* v. *Balfanz,* 193 F. 2d 1. This confusing situation calls for the prompt exercise of this Court's powers of supervision and correction in order to secure for citizens in the Tenth Circuit the adjudication of their civil actions in accordance with controlling law (i.e., State law) as required by the *Erie R. Co.* case

and cases following it and the terse provisions of 28 U.S.C., Section 1652.

I.

The decision of the Court of Appeals is not in accord with and is "opposite" and contrary to the controlling law of Texas.

The Court of Appeals admitted in its opinion that the tree against which the monkey board rested was 100 to 200 feet from the well site. That court further stated that it was between 8:30 and 9:30 in the morning when petitioner's employees unloaded the platform and leaned it against the mesquite tree, with the long side resting on the ground at an angle of 45 degrees and approximately 2 feet off center. The Court of Appeals further stated, when it was placed in that position an employee of petitioner weighing some 190 pounds jumped upon it and unfastened it from the winch line. Yet the board did not move. That court pointed out that respondent Hooks was working for Kerr-McGee *"in the substructure of the well site."* As we have shown in our Statement, the court below found from the evidence, when a lunch break was called "about 12:30 o'clock, appellee went to his automobile, got his lunch box * * *" and "* * * went to the tree and sat down underneath it in order to be in the shade when eating his lunch. The platform fell and struck appellee in the back * * *." (App. 1a-3a). Shade was provided by Hooks' automobile or by the substructure at the well site. He could have eaten his lunch at either place. Yet, he chose to crawl under the monkey board and in doing so it slid down the tree and struck him. Did this result from Hooks' choice? We say yes, because certainly petitioner could not have anticipated such an action.

The court below paid lip to service to the principle that, because the accident and injury occurred in Texas, the law of that State governed and, as that court understood the law of Texas, "it is the general rule that a licensor assumes no duty toward a licensee except to refrain from causing him injury by active negligence or wilful, wanton or reckless conduct," citing *Gonzalez* v. *Broussard* (Tex. Civ. App.) 274 S. W. 2d 737 (App. 4a).

The court below then erroneously held that respondent Hooks was a general invitee and was not a limited licensee insofar as the petitioner was concerned. It also upheld the action of the trial court in defining assumption of risk that respondent Hooks only assumed the risks of dangers actually *known* to him and refused to follow the controlling and contrary decision in Texas of *McKee* v. *Patterson,* 153 Tex. 517, 271 S.W. 2d 391 (App. 4a, 6a) and *Oaxaca* v. *Lowman,* (Dec. 1956), 297 S.W. 2d 729.

We submit that if the leaning of the monkey board against the tree created any dangerous condition, that condition was as obvious to respondent Hooks, an experienced roughneck who worked in oil fields, as it was to employees of petitioner. The courts below placed an impossible and unreasonable burden upon the petitioner because they held in instructing the jury that the jury could find, from the fact that the monkey board was leaned by petitioner's employees against a tree, negligence on the part of petitioner. On the other hand, if this were so, such danger would be open and obvious and should have been known by the respondent Hooks, an experienced oil field roughneck. Yet on this aspect of the case, the courts below refused to charge that if Hooks should have known of this dangerous condition, he could not recover, as re-

quired by the *McKee* case. There was no evidence that Hooks was invited by petitioner or his employer Kerr-McGee to crawl under the monkey board and eat his lunch there. As no invitation was given by any employee of petitioner or Kerr-McGee, we submit no such invitation could arise by any rule of law known to us, because Hooks had no business there.

In a factual situation almost identical with the facts involved in the case below, the plaintiff, who was injured as a result of a fall from a slick condition of a floor in an area where he was working was denied a recovery. The Supreme Court of Texas[3] in the leading case of *McKee* v. *Patterson,* 153 Tex. 517, 271 S.W. 2d 391 on the subject of open and obvious dangers, in very similar circumstances, held:

> "* * * the duty 'to exercise ordinary care to keep the premises in a reasonably safe condition' so that the invitee will not be injured * * * does not extend to those invitees who know *or should know* of the existence of the particular condition and who appreciate *or should appreciate its dangers* (citing many Texas cases) * * *.
>
> In determining liability, under the defense of voluntary exposure to risk, it is said that one cannot recover for injuries sustained while *voluntarily* exposing himself to a danger which he either does *or should fully realize and appreciate.* (Citing many Texas cases)." (Emphasis added)

In Texas an invitor is not an insurer of his premises with an unlimited duty to warn his invitee of dangers equally as obvious or apparent to him as to the invitor.

---

[3] The Supreme Court of Texas is the highest court and the court of last resort in Texas.

McElhenny v. *Thielepape,* (S. C., Tex., 1956), 285 S. W. 2d 940; *Houston Nat. Bank* v. *Adair,* (S. C., Tex., 1948), 207 S. W. 2d 374. The Texas rule is stated thus by the Supreme Court of Texas in *Hall* v. *Medical Bldg. of Houston* (1952), 251 S.W. 2d 497:

> "The principle as generally stated is qualified by the rule that the owner or occupant of the premises does not owe to the business invitee the duty to protect him against dangerous conditions 'that are obvious, *reasonably apparent, or as well known to the person injured* as they are to the owner or occupant.' (Citing cases)" (Emphasis added).

Under the facts in the case below, respondent Hooks crawled under the monkey board on his volition without an invitation from anyone and for a personal reason of his own, that is, his personal comfort in eating his lunch. He could have obtained the shade he wanted by eating his lunch in his own automobile where he had left his lunch at the substructure at the well site. His crawling under the monkey board had no connection with his employment and, on the contrary, if the theory of the courts below is correct, that the leaning of the monkey board against the tree created a dangerous condition, was guilty of an act of negligence in voluntarily placing himself in a condition of open and obvious danger, which danger was as obvious to him as to anyone else working near the well site. In such circumstances, the Supreme Court of Texas has held that an owner or occupant of premises is not required to anticipate such an act of negligence and when such an act of negligence (similar to the one Hooks engaged in) occurs, there can be no recovery because "the owner or occupant of the premises does not owe

to a business invitee the duty to protect him against dangerous conditions that are obvious, reasonably apparent or as well known to the person injured as they are to the owner or occupant." *Hall* v. *Medical Bldg. of Houston,* supra; *Dewinne* v. *Allen* (1955) 277 S.W. 2d 95; *Mackey* v. *F. W. Woolworth Co.* (1953) 277 S.W. 2d 180; *McElhenny* v. *Thielepape* (1956) 285 S.W. 2d 940; *Otto* v. *Bobo* (1956) 287 S.W. 2d 274.

In the *Otto* case, the Court of Civil Appeals followed the case of *McKee* v. *Patterson,* supra, and held (p. 278):

> "The duty to keep premises safe for *invitees* applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls and the like in that they are not known to the invitee and *would not be observed by him in the exercise of ordinary care.* The invitee assumes all normal risks attendant upon the use of the premises and the owner or occupant is under no duty to reconstruct or alter the premises so as to obviate known and *obvious dangers nor is he liable for injury to the invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care.*" (Emphasis added).

To the same effect are *Marshall* v. *San Jacinto Building,* 67 S.W. 2d 372; *Skillerns* v. *Paxton,* 293 S.W. 2d 521.

Even if we accept the argument of the courts below that respondent Hooks was not a licensee, which we contend he was, and treat him as an invitee, because he had work to do some 200 feet from the mesquite tree, the law of Texas precludes him from recovering because the danger which he charges the petitioner's employees with creating was open and obvious to him.

In such circumstances, he cannot recover. *McFerren* v. *Brae Burn County Club* (1955) 274 S.W. 2d 122. In the *McFerren* case, the Court of Civil Appeals held (p. 124):

> "In this Court, appellant supports his position as to the standard of care he claims was due him in this instance by the appellee, by citing the cause of *Carlisle* v. *J. Weingarten, Inc.*, 137 Tex. 220, 152 S.W. 2d 1073, 1074, and quoting this paragraph therefrom: 'It is settled by the law of this State that if the plaintiff was on the premises as an invitee, it was the defendant's duty to exercise ordinary care to keep its premises in a reasonably safe condition, so that the plaintiff would not be injured; and that if the defendant failed so to do, it would be liable for the damages proximately caused thereby. *Kallum* v. *Wheeler*, 129 Tex. 74, 101 S.W. 2d 225.'
>
> *"This Court, however, while recognizing the rule so set down in the Carlisle* v. *J. Weingarten, Inc. case, and further that, under the facts, appellant's status on the premises involved was that of an invitee, is constrained to further hold that the rule that is so expressed by the Supreme Court has no application to the undisputed record in this cause. This for the reason that it is also well established that an invitee, to recover damages resulting from a hidden danger, must prove the existence of such a danger, and that the owner, or occupant, of the premises involved, knew or ought to have known, of that particular danger."* (Emphasis added).

The actions of the courts below in refusing to direct a verdict for the petitioner and in refusing to instruct the jury that the respondent Hooks could not recover, if the jury found that he should have known that it was dangerous to sit under the monkey board

to eat his lunch, are in direct conflict with the law of Texas. All persons are entitled to equal justice under the law. If petitioner was negligent in placing the monkey board against the tree, then respondent Hooks, an experienced roughneck, must be held equally negligent in voluntarily sitting under it. We think ordinary principles of justice and Texas law require that the same rule be applied to both parties. A plaintiff under Texas law is not permitted to recover from a defendant when their actions are for all purposes identical. In other words, under the decisions of Texas, even though a defendant might be guilty of an act of negligence in creating a condition which might be termed dangerous, if another can or should observe that condition, and, nevertheless, puts himself in a position of open and obvious danger, that latter act is the proximate cause of the accident and not the original act of a defendant (like that of petitioner). Under Texas law, where a party places himself in a position of obvious danger, the original creation of the "dangerous" condition is remote and is not the proximate cause of the accident. *Phoenix Refining Co.* v. *Tips* (1935) 81 S.W. 2d 60; *Union Gas Co* v. *Madeley* (1932) 55 S.W. 2d 259; *Magnolia Petroleum Co.* v. *Cocke* (1928) 3 S.W. 2d 139, and see *Oaxaca* v. *Lowman* (decided December, 1956), 297 S.W. 2d 729.

Thus, to illustrate our contention, had respondent Hooks gone under the monkey board to answer a call of nature, under Texas law, he would have become a licensee and could not recover. Is going under the monkey board to eat lunch any less personal? We say no. *Jameyson* v. *Farmers Gin Co.-Operative Association,* 278 S.W. 2d 169. In the *Jameyson* case, plaintiff, who was an invitee to haul ash from defendant's premises, went near a burner, to answer a call of

nature, where he suffered injuries. Yet the Texas Court of Appeals held:

> "* * * When he turned aside from his inspection and walked toward the burner, he became a licensee * * *. The Gin Association extended no invitation to plaintiff to approach the entrance to the burner of the incinerator for a purely personal purpose. When plaintiff was injured, he was a licensee only. (Citing many cases)."

Hence, the courts below were in error, under Texas law, in applying the rule of ordinary care to petitioner's actions.

This error and the District Court's erroneous instructions on assumption of risk destroyed the Texas rule of proximate cause as construed in the *Phoenix Refining Co., United Gas Co.* and *Magnolia Oil Co.* cases, supra, and in *International-Great Northern R. Co.* v. *Lowry,* (1938) 121 S.W. 2d 585. In the latter case defendant's employee received serious injuries when he jumped from a moving train when defendant's conductor negligently failed to cause the engineer to stop the train at Gould where plaintiff had been ordered to perform work. In denying liability of the railroad to its employee, the Texas Court held:

> "In our opinion it clearly appears from the facts in evidence that the *injury suffered by defendant in error was not the natural and probably consequence of plaintiff in error's negligence and that it was not an injury that might reasonably have been anticipated.* Inconvenience to defendant in error and the loss of time on account of being carried beyond his destination, instead of physical injury, would have been the natural and probably consequences of the failure of the conductor to cause the train to stop. Defendant in error's jumping from the train moving at thirty-

five miles an hour was not reasonably to have been anticipated. He was not required or expected in the performance of his duties to board or alight from trains in motion. A person of ordinary prudence under the same circumstances, would have remained on the train and returned to Gould on another train. * * *"

The Texas Court continued:

"Defendant in error was not placed in a position of peril, either actual or apparent, by the negligence of plaintiff in error, but was in a safe position on the train until he elected to jump. * * *

"That defendant in error's act in jumping from the train was not reasonably foreseeable is made more certain by the fact, established by the evidence above mentioned, that *his injury was the result of his own independent and voluntary act for which there was no necessity.* * * *

"The chain was broken when the independent act of the defendant in error, *not within the reasonable contemplation of plaintiff in error, intervened to bring about the injury.* Under such state of facts the original or primary wrong is regarded a condition or a remote cause and the intervening act, the proximate cause or, as it is sometimes designated for want of a more accurate term, the *sole cause.* (Citing many cases.)" (Emphasis added).[4]

When the Texas law is applied here, only one reasonable conclusion can be reached, that the proximate

[4] Compare these facts with ours. Here respondent Hooks could have eaten his lunch in the shade of the well substructure, as all other employees did, in his automobile, or in the sun, as many employees in Texas do. Yet he crawled under the monkey board and obviously caused it to fall on his back. Do not the *McKee* and *International-Great Northern R. Co.* cases preclude a recovery? We say yes.

cause of respondent Hooks' injuries was his voluntarily, for his own convenience, crawling under the monkey board and causing it to fall upon his back. Proper application of the law of Texas required the entry of a directed verdict in favor of petitioner. So we say the Tenth Circuit reached a decision here "opposite" to Texas law which we discuss in detail later.

Since the courts below did not follow controlling Texas law, a typical situation is presented in which this Honorable Court in a number of cases granted certiorari in order to require the adherence by Federal courts to State laws governing local causes of action. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Russell* v. *Todd,* 309 U. S. 280; *Wichita Royalty Co.* v. *City National Bank,* 306 U. S. 103. In other words, when a Federal court adjudicates civil rights arising in a state of the Union, the Federal court in effect should act as the court of the State. *Guaranty Trust Co.* v. *York,* 326 U. S. 9. Clearly the failure of the courts below to follow applicable and controlling Texas law violates many controlling decisions of this Court and the Rules of Decision Act, 28 U.S.C. Section 1652.

II.

The decision below and an earlier decision of the court below are "opposite" and in conflict with two decisions of the Fifth Circuit in construing the law of Texas.

As we have pointed out earlier in this Petition, the court below here has refused to follow the law of Texas, particularly as announced in *McKee* v. *Patterson* (1954) 271 S.W. 2d 391. In an earlier decision,[5] the court below likewise refused to follow the principles of *McKee* v. *Patterson.* In other words, the court below has refused to apply that principle of

[5] *Swift & Co.* v. *Shuster,* 193 F. 2nd 615.

Texas law which is clearly enunciated in the *McKee* case and in the cases following it that a plaintiff cannot recover if the dangerous condition of which he complains *should have been known to him.* Not only has the court below refused to apply this principle of Texas law, but it refused to instruct the jury below in accordance with the Texas law announced in the *McKee* case. In this regard, we submit that the Fifth Circuit has correctly construed the law of Texas in the cases of *Bagby* v. *Barton,* 131 F. 2d 887 and *U. S. Gypsum Co.* v. *Balfanz,* 193 F. 2d 1.

Thus, contrary to the decision of the court below, the Fifth Circuit in the *Bagby* case held that in determining whether a person was an invitee or in the absence of an express invitation a licensee, this question would turn on the principle of whether an invitation could be inferred because of a common interest or mutual advantage, and in such circumstances, a person could be an invitee. Thus the Court of Appeals for the Fifth Circuit held, where a person's object on the premises is pleasure or is for the benefit of the person using it, then that person becomes a licensee under Texas law. Further, in construing Texas law, that Court of Appeals held, even though a person is not wrongfully upon a premises, if he uses the premises for his own personal use and in a manner not contemplated by the owner, that he becomes a mere licensee, which means that the owner of the premises or the user of the premises owes to that person the duty to abstain from wilful injury only.

In the *U. S. Gypsum Co.* case, supra, the facts were very similar to the facts involved in the case below, and were as follows: A building contractor fell into an open air duct or tunnel in a heater room. It was

claimed by the plaintiff, while on his way to talk to two of his men who were working in one of the large tubes, that he fell into the open end of the tunnel, which defendant had negligently left open, unguarded and unlighted. It was further claimed the defendant negligently removed a barricade that the plaintiff had erected to prevent workmen from falling into the tunnel. The district judge refused to direct a verdict for defendant and submitted the case to the jury, among other things, on the question of the defendant's negligence. The plaintiff recovered a verdict. The Court of Appeals for the Fifth Circuit pointed out that the defendant's primary point in the case was, while the plaintiff was an invitee to the premises, he was not an invitee of the defendant concerning plaintiff's use of the dark and dangerous passageway, because plaintiff had *or should have knowledge of its existence* (p. 3). The Court of Appeals agreed with plaintiff's primary contention, reversed the case and ordered that the verdict and judgment of the District Court be reversed and a judgment entered for the defendant (p. 4), ruling (p. 4):

> "As applied to the undisputed facts of this case, the law is simple and plain, and we are in no doubt that a verdict for defendant should have been directed. While it is clear that plaintiff was an invitee on those portions of the premises of defendant where he had business to be, and defendant, as to such places, owed him the duty of due care, including the duty to warn him and protect him against latent or concealed perils, *it did not owe him the duty to warn him of conditions known to him, or in respect of places and situations where he had no reason to be, and where it had no reason to anticipate he would be.*

"In addition, the undisputed evidence establishes as a matter of law that plaintiff's own negligence was the sole proximate cause of his injury. It is a cardinal rule of law that 'a person is required to make reasonable use of his faculties of sight, hearing, and intelligence to discover dangers and conditions of danger to which he is or might become exposed, *and one injured as a result of his failure to use his faculties to observe and discover a danger which would have been observed and discovered by an ordinarily prudent person is guilty of contributory negligence.*'" (Emphasis added).

Persons versed in Texas law recognize that the decisions of the Tenth Circuit are in "sharp conflict" with Texas law controlling injuries from open and obvious conditions. This is well illustrated by the Dean and a Professor of Law of the University of Texas, W. Page Keeton, in his learned article entitled, "Personal Injuries Resulting from Open and Obvious Conditions—Special Issue Submission in Texas," Volume 33, Texas Law Review, No. 1, pp. 1-23. Dean Keeton points out (p. 1) that the controlling case in Texas on the question of injuries resulting from open and obvious conditions is *McKee* v. *Patterson,* 271 S.W. 2d 391, which "held that the duty of an occupier * * * who was in possession and control of premises, does not extend to those *invitees*[6] who know *or should know of the existence of the particular condition* and who appreciate *or should appreciate its dangers.*" Concerning the failure of the Tenth Circuit to follow the *McKee* case, Dean Keeton tersely writes (p. 2):

---

[6] Note that this rule is applied to *invitees.* We submit Hooks lost his standing as an invitee when he crawled under the board leaning against the tree for his personal wishes without any actual or implied invitation.

> "The shart conflict which has developed in this type of case is illustrated by *Swift & Co.* v. *Shuster,* (192 F. 2d 615), a decision of the United States Court of Appeals for the Tenth Circuit, *where the court reached the opposite* result in a similar situation, one judge dissenting." (Emphasis added).

There is a pressing need that this Court resolve this conflict, based on the original majority vote of only *one* judge, in order to insure to litigants whose cases arise under Texas law in the Tenth Circuit, that they receive a fair trial and have their civil actions arising under Texas law adjudicated in accordance with that law as required by the decisions of this Honorable Court and by Congress. (28 U.S.C., Section 1652) The time is ripe, and overripe, for the elimination of the confusion caused litigants of civil cases arising under Texas law due to the flat refusal of the Tenth Circuit to apply Texas law to actions arising in Texas.

CONCLUSION AND PRAYER

Wherefore, your petitioner concludes and prays that this Honorable Court grant a Writ of Certiorari and bring before this Court for review and correction the decision and judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

WARREN E. MAGEE
745 Shoreham Building
Washington 5, D. C.

CLYDE J. WATTS
760 First National Building
Oklahoma City, Oklahoma

HOWARD BARKER
1500 Sinclair Building
Ft. Worth 2, Texas

Attorneys for Petitioner

February, 1957

INDEX TO APPENDIX

	Page
Opinion below entered November 26, 1956	1a
Judgment below entered November 26, 1956	11a
Order Denying Appellant's Petition for Rehearing ..	11a